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Supreme Court, U.S.
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No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

WILLIAM PETER BLATTY,
Petitioner,

vs.

NEW YORK TIMES COMPANY,
and DOES 1 through 10, inclusive,
Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF
RICHARD M. COLEMAN
A Professional Corporation
RICHARD M. COLEMAN
Attorney for Petitioner
ALLAN IDES
Of Counsel
1801 Avenue of the Stars
Suite 810
Los Angeles, California 90067
(213) 277-2700

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I.

INTRODUCTION.

The issue presented in this case involves the extent to which the First Amendment to the United States Constitution places limits upon non-defamation tort causes of action that are premised upon an injurious falsehood. Specifically, the question is whether, under the First Amendment, the "of and concerning" requirement that pertains to defamation causes of action must be satisfied in a cause of action for intentional interference with prospective economic advantage. The California Supreme Court held that it must.

This holding was not based upon any logical relationship between the "of and concerning" requirement and the intentional interference tort. Rather, as more fully explicated below and in the Petition for a Writ of Certiorari, that decision was based upon the California Supreme

Court's interpretation of two decisions by this Court, both of which arose in the specific context of the First Amendment as it relates to defamation. Petition at 14-28; Pet.App. at 80-91. *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The state court construed *Sullivan* and *Baer* as requiring satisfaction of the First Amendment elements of a defamation cause of action whenever a plaintiff claims an injury based upon a false statement made by a media defendant. This construction of *Sullivan* and *Baer* involves a further intrusion of federal constitutional law into the realm of state tort law.

Moreover, the decision of the California Supreme Court is in conflict with a recent decision by the Fourth Circuit Court of Appeals over which this Court has granted review. *Falwell v. Flynt*, 797 F. 2d 1270 (4th Cir.), *reh. den.*, 805 F.2d 484, cert. granted, 107 S.Ct. 1601 (1987).[1] Petitioner contends that a combination of the importance of the issue presented and the conflict with *Falwell* make this case an appropriate candidate for this Court's review. Full briefing on this case and *Falwell* will provide the Court an important opportunity to thoroughly examine the extent to which the First Amendment applies to torts that allege a non-defamatory injurious falsehood.

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[1]Respondent states without elaboration that the conflict between this case and *Falwell* is dictum. Respondent's Brief at 8-9 n.5. In fact, the disagreement between the California Supreme Court and the *Falwell* Court is based upon a fundamental difference in each court's respective approach to the First Amendment as it applies to torts involving non-defamatory falsehoods. According to the California Supreme Court, the rules adopted in the context of defamation must be applied to all such torts; according to the *Falwell* Court, although the First Amendment fully applies to such torts, the specific rules developed in the context of defamation need only be applied to the extent those rules are relevant to the elements of the tort. *See Falwell, supra* at 1275. The California Supreme Court specifically rejected this reasoning. Pet.App. at 99-100.

In its opposition to the Petition, *respondent does not address the substantive issue presented.* Instead, respondent argues the decision of the California Supreme Court was based upon an independent and adequate state ground. In so arguing, respondent creatively rewrites the decision of the California Supreme Court and at the same time misinterprets this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). Indeed, the approach adopted by respondent confirms that the decision below was not based on an independent and adequate state ground, but was based squarely on federal precedent.[2]

II.

RESPONDENT'S DESCRIPTION OF THE CALIFORNIA SUPREME COURT DECISION.

A. Misleading Assertion.

Respondent's description of the decision below appears in an argumentative section of its brief entitled, "Statement of the Case". Respondent's Brief at 6-10.[3] The

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[2]It would appear that respondent's reluctance to discuss the substantive issue is based upon a desire to avoid discussing the federal decisions upon which that issue rests.

[3]Oddly enough, respondent begins its description of the California Supreme Court decision with a quotation from the concurring and dissenting opinion. Respondent's Brief at 6. The point of this quotation is illusive since the issue now presented is whether the *majority* of the California Supreme Court decided this case based upon federal law. The views of the dissent are entirely irrelevant to this point. As previously noted (Pet. 8 fn.4), the dissent inexplicably overlooked specific intentional language of the complaint, *e.g.*, "At the time . . . such representations [about the List were made], defendants knew them to be untrue" (Pet.App. 6) and "Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and properties in refusing to include *Legion* on the List for many weeks for which it qualified" (Pet.App. 13). This case was argued October 7, 1986 and, due to the

description does not include any discussion of how the California Supreme Court arrived at its holding. Nor does the description quote in full the language which, according to respondent, provides a clear and express statement of the state law grounds of decision. Instead, respondent provides a cleverly worded description of the California Supreme Court decision that is both inaccurate and misleading. It leaves one with a false impression of what the California Supreme Court actually said with respect to the basis for its holding. It also suggests, without any supporting explanation, that the state court discussed and applied several state authorities in assessing the constitutional question presented. Both contentions are fully refuted by any fair examination of the California Supreme Court's decision.

After describing the California Supreme Court's holding (and ignoring completely the federal cases discussed by the court in arriving at that holding), respondent makes the following assertion:

> The majority opinion rested both on federal first amendment and on state free speech grounds. The majority "clearly and expressly" stated a bona fide separate, adequate and independent" state constitutional ground, on which it "primarily rel[ied]" for its decision (App. 103 n.4), entirely apart from any first amendment considerations.

Respondent's Brief at 7. *This is not a description of what the California Supreme Court said or did; it is a description of what respondent wishes that Court had done.*

In any event, the opening sentence of the above quotation concedes federal law played a part in the decision.

November election result, was one of a large number of cases required to be decided before December 31, 1986. In any event, *the majority opinion* is based not upon pleading allegations but upon First Amendment grounds. (Pet. 6, 7 and citations therein)

That being the case, under *Michigan v. Long,* 463 U.S. 1032 (1983), the question is whether "the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached". 463 U.S. at 1041. The California Supreme Court never addressed itself to this point. Respondent, in an apparent recognition of this failing, however, has attempted to rewrite the California Supreme Court decision in order to make it appear otherwise.

To this end, the second sentence of the above quote is a curious admixture of unattributed language from *Michigan v. Long* (the first two quoted phrases), two words extracted from the California Supreme Court decision ("primarily relied") and *an additional, telling phrase supplied by respondent.* That additional phrase — "entirely apart from any first amendment considerations" — is the key to the description. It is designed to satisfy concerns expressed in *Michigan v. Long.* Indeed, had the California Supreme Court actually used such a phrase and such an approach, this case would be in a very different posture. But no such phrase or approach was used. The fact that respondent seems compelled to supply the needed language of compliance merely underscores the deficiency of the California Supreme Court opinion on this score.

The actual language used by the California Supreme Court appears in a footnote and reads as follows:

> Throughout this opinion we have used "First Amendment" to refer not only to that provision of the United States Constitution, but also to article I, section 2, of the California Constitution. It is the latter on which we primarily rely.

Pet.App. at 103 n.4. There is no suggestion, much less any specific language, indicating that the California Constitution was construed "entirely apart" from its federal

counterpart. Indeed, the footnote suggests to the contrary — the United States Constitution was relied upon. The ambiguity of the language adopted by the California Supreme Court leaves the extent and role of the United States Constitution unclear. Whether federal precedents were deemed controlling or merely advisory simply cannot be ascertained. The actual basis for the decision becomes even more ambiguous when one considers the text of the opinion in which primary reliance is placed on federal precedent. Pet.App. at 80-91.

B. Decision Below Based on Federal Precedent.

In seeming recognition of these flaws, respondent attempts to recharacterize the body of the opinion by asserting that "the majority opinion was *strewn* with references to decisions of the California Supreme Court. The Court quoted from or cited ten separate California decisions in its analysis of the constitutional free speech issue, alone". Respondent's Brief at 8 (emphasis added).

Respondent does not explain how any of these "separate California decisions" played a role in the formulation of the state court's holding. This is not surprising since the section of the California Supreme Court's opinion in which it discusses the precise issue now presented, namely, whether the First Amendment requires imposition of the "of and concerning" requirement to the intentional interference tort, is not "strewn" with references to state decisions. In fact, only five state authorities are cited in that section, four of which are cited solely for propositions collateral to the issue being decided.[4]

[4]Of these four cases, three were cited in introductory paragraphs in which the California Supreme Court described in very general terms the breadth of the protection afforded the press under the federal and state constitutions. The respondent devotes four pages (Brief 15-18) to a discussion of cases characterizing the California Constitution as establishing a zone of protection broader than the First Amendment.

Pet.App. 77-91. The one California case that is relied upon, and then only marginally, was itself a decision unequivocally based on the First Amendment to the United States Constitution. *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P. 610 (1984) (construing and applying *Gertz v. Welch*, 418 U.S. 323 (1974)).

Any fair reading of the text of the California Supreme Court's opinion confirms the decision was based almost exclusively upon an interpretation of two decisions by this Court: *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75 (1966).[5] To suggest otherwise can only be a product of the most wishful thinking.

In sum, respondent's descripton of the decision below is far from accurate. The description of the text of the opinion is both factually incorrect and incomplete. The enhanced description of footnote four is misleading and indicative of the lack of a sound basis for respondent's contention that the decision of the California Supreme

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However, not one of the cases discussed bears upon the instant issue. As to that issue, the California Supreme Court explicitly reasoned to the result from this Court's holdings. (Petition 43-46)

The fourth case was cited at the end of a string of citations for the collateral proposition that actual malice must be established in a case involving false light invasion of privacy. *Kapellas v. Kofman*, 1 Cal.3d 20, 459 P. 2d 912, 81 Cal.Rptr. 360 (1969). Other state law decisions are defamation cases cited in a subsequent section of the opinion relative to whether petitioner's pleadings satisfied the "of and concerning" requirement. Those decisions had no bearing on the requisites of constitutional law, state or federal. Specifically, not one of the California decisions led to the resolution of the instant issue, whether the "of and concerning" element is required by the First Amendment in non-defamation cases.

[5]Amazingly, Respondent's Brief does not even mention *Rosenblatt v. Baer, supra*, the linch pin in the California Supreme Court's reasoning. (Pet.App. 81, 82)

Court was based on an independent and adequate state ground.

III.

NO INDEPENDENT AND ADEQUATE STATE GROUND.

As previously indicated, in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court expressed concerns regarding the difficulty of determining whether state court decisions rested on state or federal grounds when a state court decision has relied upon both state and federal precedent. (Petition 48, *et seq.*)

The opinion of the California Supreme Court, at least with respect to the substantive issue now presented, rests almost exclusively on federal grounds. Petition at 43-47. Indeed, there is very little intermixing of state and federal decisions. Consistent with *Michigan v. Long*, "the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law required it to do so". 463 U.S. at 1041. The only legitimate question is whether footnote four to the California Supreme Court's meets the "plain statement" requirement of *Michigan v. Long*:

> If a state court chooses merely to rely on federal precedent as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. *Id.* at 1041.

Without any elucidation, respondent asserts footnote four satisfies these requirements:

> "A more 'plain statement' that a decision rests upon separate state grounds cannot be imagined. . . ." (Brief at 13)

Respondent's *ipse dixit* ignores precedent (*e.g. State v. Stroud*, 720 P. 2d 436, 439 (Sup.Ct. Wash. 1986)) and the facts. Nothing in footnote four indicates federal cases were "used only for the purpose of guidance". Rather, the language concedes an intermingling of federal and state constitutional law. Nor does the footnote in any manner undermine the fair inference drawn from the text of the opinion that federal authority compelled the result the court reached. Even if the state constitution were the primary source of authority for the decision, it is unclear the extent to which the interpretation of the state constitution was compelled by federal precedent. *Indeed, in the body of the opinion, the California Supreme Court indicates that its conclusion is mandated by the Supremacy Clause of the United States Constitution.*[6] Pet.App. at 99-100. In sum, there is no statement that "indicates clearly and expressly" the independence and adequacy of the state grounds of decision. *Id.* 1041. (Pet. 53-55)

In recent decisions, this Court has continued to insist when a state decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law", the independence and adequacy of any alleged state ground for decision must be "clear from the face of the opinion". *Montana v. Hall*, 107 S.Ct. 1825, 1827 n.3 (1987); see also

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[6]It is upon this basis, the Supremacy Clause, that the California Supreme Court, rejects the reasoning of the Fourth Circuit Court of Appeals in *Falwell v. Flynt, supra.* Pet.App. at 99-100. Had the basis for the California Supreme Court's decision been an independent and adequate state ground, this reference to and reliance upon the Supremacy Clause would have been superfluous.

Maryland v. Garrison, 107 S.Ct. 1013, 1017 (1987) (failure to include "plain statement" establishes federal jurisdiction).

IV.

CONCLUSION.

The California "of and concerning" cases referred to in respondent's Brief deal with that element as required *in defamation actions*. The point at issue here is whether the "of and concerning" element is required by the First Amendment in a non-defamation case. In concluding that such an element is required, the California Court relied on federal precedents. (Pet. 14-17, 43-47)

Aside from the certworthiness of the substantive issues presented in the Petition for a Writ of Certiorari, the California Supreme Court's treatment of the purported independent and adequate state ground issue merits this Court's immediate attention. Footnote four of the state court's opinion appears designed to insulate that decision from this Court's review while at the same time permitting the state decision to operate as a substantial federal precedent. (Pet. 47, fn. 12) This type of judicial gamesmanship should be addressed and rejected by this Court.

Respectfully submitted,

Law Offices of
RICHARD M. COLEMAN
A Professional Corporation
Counsel of Record
RICHARD M. COLEMAN

ALLAN IDES
Of Counsel

Attorneys for Petitioner
William Peter Blatty

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 15, 1987, I served the within Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari in re: "William Peter Blatty vs. New York Times Company" in the United States Supreme Court, October Term 1986;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Richard P. Levy
Gibson, Dunn & Crutcher
333 So. Grand Avenue
Los Angeles, California 90071
(Hand Delivered)

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 15, 1987, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA